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No. 493.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

FREDERICK SEYMOUR BARRINGTON, Plaintiff in Error,

vs.

THE STATE OF MISSOURI, Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

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As counsel for the plaintiff in error in his brief in answer to the motion to dismiss or affirm makes the contention that certain Federal questions were raised in the trial of this case which were not discussed or considered in our original brief in support of the motion to dismiss or affirm, we ask leave to present this reply brief. These questions were not discussed in our original brief because no assignment of error were filed as required by Sec. 997, Revised Statutes, and it is our contention that the record does not justify the claim made by the counsel for the plaintiff in error that they present a Federal question.

I.

It is contended by the plaintiff in error (Brief p. 2) that he "set up and claimed that under the Federal Constitution, as well as under the Constitution of Missouri,

he could not be compelled to give testimony against himself, and that this exemption and protection were denied to him by the court in permitting to be given in evidence against him alleged extra judicial admissions, extorted from him while under arrest, by police officers of the State." Counsel for the plaintiff in error then refer to and quote from a decision of Judge Valliant dissenting from the decision and opinion of the Supreme Court of Missouri in reference to the admission by the trial court of the statements made by him after his arrest. (Brief p. 6.) And counsel for the plaintiff in error (Brief p. 7) then states:

> "The facts relating to this transaction (namely, the circumstances under which these statements were made by the defendant) are fully set-forth in the record. (Rec. pp. 425-490.)
>
> The Constitution of Missouri, like the Federal Constitution, contains provisions designed to secure to a defendant, in a criminal case, a fair trial by an impartial jury, to protect him against being compelled to give testimony against himself, and to insure that no one shall be deprived of life, liberty or property without due process of law."

As this contention was not referred to in the original brief filed for the defendant in error in support of the motion to dismiss and affirm, we now desire to submit the following observations in reference to this contention.

The testimony showing the circumstances under which the statements made by the plaintiff in error which were admitted in evidence are to be found, as stated by counsel for plaintiff in error on pages 425 to

490 of the printed record. An examination of that portion of the record fails to disclose that counsel for the plaintiff in error objected to the introduction of this testimony on the ground that any rights, privileges or immunities of the defendant under the Constitution and laws of the United States were thereby violated.

On page 427 of the record, the following objection was made when counsel for the State offered in evidence certain articles taken from the trunk of the defendant:

> "We object to his evidence upon the ground that it was taken without due process of law—taken in violation of the State Constitution which prohibits the making of a man a witness against himself, and was taken without the voluntary consent of the defendant."

This objection was not passed upon by the court at that time, and the witness was withdrawn. When the trunk and its contents were again offered in evidence (Rec. pp. 428, 429) no objection was made by counsel for the plaintiff in error which presented in any way any question under the Constitution of the State of Missouri or the Constitution or laws of the United States. The objection at that time was based entirely upon the ground of irrelevancy and immateriality and the fact that proper foundation had not been laid in the identification of the trunk (Rec. pp. 428, 429, 431).

When the State sought to offer in evidence the statements made by the defendant following his arrest, the court first excluded the jury and heard the testimony of the persons present at the time for the purpose of determining the competency of the testimony (Rec. p. 433). After an examination of a number of witnesses who detailed fully the circumstances under which the statements were made by the defendant following his arrest, all

being to the effect that the statements were made voluntarily by the defendant, without any force, compulsion or threats being used, (Rec. pp. 433 to 490) his counsel then offered the following objection; (Rec. p. 490).

> "Now we object to the second confession, because there is no foundation laid for it and because it was voluntary. We object to everything, but while he was under the first arrest. I do not object to that going in, but all this sideshow down at the police station, I object to it and all these other statements."

This objection was overruled, and exceptions saved. These are the only portions of the record in which it is claimed by plaintiff in error that any objections were made in the trial of this case to the introduction of statements made by the defendant. As none of these objections referred in any way to any right, privilege or immunity of the plaintiff in error under the Federal Constitution, it is submitted that no question is presented by the ruling of the trial court in admitting this testimony which can be made the basis of a contention that this Court now has jurisdiction. While the Missouri Constitution provides (Art. II, Sec. 23) "that no person shall be compelled to testify against himself in a criminal case," it was for the Supreme Court of Missouri to say whether that privilege which belonged to the defendant under its provisions had been violated by the rulings of the trial court, in case such an objection had been properly made at the time. The Supreme Court of the State of Missouri has held that the trial court in admitting this testimony did not commit error and did not act contrary to the constitutional guarantee secured by the provisions of

the Missouri Constitution. Its rulings upon that proposition are not subject to review in this court.

Jackson vs. Lamphire, 3 Pet. 280.

Pittsburg Ry. Co. vs. Backus, 154 U. S. 425.

Murray vs. Louisiana, 163 U. S. 101.

Missouri vs. Harris, 144 U. S. 210.

After the decision of the Supreme Court en Banc affirming the judgment of the circuit court of St. Louis county and denying to the plaintiff in error a new trial, he filed a motion for rehearing (Rec. pp. 697-8). In this motion for rehearing is the only contention that we have been able to find in which it is asserted by plaintiff in error that through the admission of the statements made by him after his arrest, any right, privilege or immunities secured to him under the Constitution of the United States was violated. The third ground of that motion for rehearing (Rec. p. 698) is as follows:

> "Because counsel for appellant, through neglect and inadvertence, failed to call the attention of the court to the proposition that the cross-examination of appellant complained of as 'improper' and the admission as evidence of statements or 'confessions' made by appellant while in the 'sweat box' of the St. Louis police department, was in direct violation of the Constitution of the United States.
>
> Art. V., amendments to the Const. of U. S. in that it compelled the appellant to become a witness against himself."

Counsel for the plaintiff in error thus concede that this testimony was not objected to at the time it was offered on the ground that its admission would be in

violation of the Constitution of the United States. The only objection was upon the ground that the admission of this evidence was "improper." Article V of the Amendments to the Federal Constitution, which provides that no person shall be compelled "in any criminal case to be a witness against himself," does not operate as a "restriction on the powers of the State, but was intended to operate solely on the Federal Government."

Brown vs. New Jersey, 175 U. S. 172.

Barron vs. Baltimore, 70 Pet. 243.

Further, as this motion for rehearing was overruled by the Supreme Court of Missouri without any opinion being written thereon, or without any reference being made to this contention, no Federal question was thereby raised which is subject to review in this Court.

Bushnell vs. Crook Min. & Smelting Co., 148 U. S. 690.

Pim vs. St. Louis, 165 U. S. 273.

Capital National Bank vs. First National Bank, 172 U. S. 425.

Turner vs. Richardson, 180 U. S. 87.

It is further to be noted that nothing is said, either in the opinion and decision of the Supreme Court of Missouri, or in the dissenting opinion written by Judge Valliant, in reference to the proposition that the admission of the statements made by the defendant following his arrest in any way violated any rights, privileges or immunities that he enjoyed under the Constitution or laws of the United States or that thereby he was deprived of due process of law. If the admission of this testimony did not violate the rights of the plaintiff in error under

the Constitution and the laws of the State of Missouri, then he was awarded due process of law.

Howard vs. Fleming, 191 U. S. 126.

Dryer vs. Illinois, 187 U. S. 71, l. c. 77-78.

II.

Counsel for the plaintiff in error devotes considerable attention to the proposition that some right, privilege or immunity of the plaintiff in error under the Constitution of the United States was violated through the action of the trial court in refusing to grant to the plaintiff in error a change of venue. This contention was dealt with in our original brief.

The record in this case (pp. 664 to 667) shows that the trial court heard the testimony of forty-one witnesses in support of the application for a change of venue, and thirty-seven witnesses who were called by the State in opposition thereto; that after hearing the testimony of those witnesses, the trial court decided that prejudice justifying a change of venue had not been shown by the testimony, and denied the application. As is stated in the decision of this case by the Supreme Court of Missouri (Rec. p. 665):

> "It is now a well settled rule of law in this State that the granting of a change of venue in a criminal case rests largely in the discretion of the trial court, and where the trial court has heard the evidence in favor of and against the application, and a conclusion reached adversely to granting the change, such ruling will not be disturbed by this court, and should not be, unless there are circumstances of such a nature as indicate an abuse of the discretion lodged in such court."

The Supreme Court, after a full review of all this testimony, decided that the trial court had acted properly in overruling the application for a change of venue. To contend that the decision of the trial court and of the Spureme Court of Missouri upon this question presents a Federal question, would be to invoke the doctrine that the Supreme Court of the United States could decide that the trial court had abused its discretion under the laws and the Statutes of the State of Missouri in denying a change of venue, although the Supreme Court of the State of Missouri had held to the contrary.

III.

Counsel for the plaintiff in error contends in his brief (page 12) that counsel for the defendant in error "admit that the plaintiff in error did raise Federal questions" both in the circuit court of St. Louis county and in the Supreme Court of the State, and the different pages in the record are then indicated where it is claimed these Federal questions are shown to have been raised, viz: (Record, pp. 419, 422, 619, 629, 631, 697 and 698.)

Counsel for the plaintiff in error apparently fail to understand our contention in reference to this matter. We do not deny that counsel for plaintiff in error, both in the trial court and the appellate court, claimed that certain rulings and decisions of the trial court and the Supreme Court violated certain provisions of the Federal Constitution. But we do not concede that a Federal question is raised by an assertion in a motion or objection that a provision of the Federal Constitution has been violated when, manifestly, on the face of the record, such a contention is entirely untenable.

The first Federal question claimed to have been raised, viz: Rec. p. 419, is that attempted to be raised by

the application for a change of venue, which has already been referred to.

The Federal question which it is claimed appears to have been raised on page 422 of the printed record, was the general exception saved to the action of the trial court in overruling the application for a change of venue.

The third place in which it is claimed that a Federal question was raised in the trial of this case, viz: Rec. p. 619, contains grounds four to ten of the motion for new trial, in none of which grounds is any reference made to any provision of the Federal Constitution.

The next place in the printed record in which it is claimed that a Federal question was raised, viz: Rec. p. 629, is to be found the judgment of Division No. 2, the division of the Supreme Court of Missouri having jurisdiction of criminal cases, affirming the judgment and decision of the circuit court of St. Louis county, and the beginning of the motion filed by plaintiff in error in Division No. 2 for a transfer of the case to the Court en Banc.

By referring to page 631, printed record, the next page on which it is claimed a Federal question is shown to be raised, appears the order of the court sustaining the motion to transfer the case to the Court en Banc. In the motion to transfer the case from Division No. 2 to the Court en Banc, plaintiff in error claimed that certain Federal questions had been raised in the record and decided adversely. All the Federal questions therein alleged to have been raised in the record have heretofore been referred to. None of these questions were, however, considered or passed upon by the Court en Banc in the decision that it rendered after the case was transferred to it from Division No. 2.

That this motion did not present a Federal question

has already been discussed and referred to in our former brief, pages 8 and 9.

The next place in the record in which it is claimed a Federal question is shown to have been raised, is at pages 697 and 698, printed record, on which pages is to be found a motion for rehearing after the decision of the Court en Banc. In this motion for rehearing, counsel for the plaintiff in error again claimed that certain rights, privileges and immunities secured to him by the Constitution of the United States had been violated. That a Federal question was not raised, although attempted to be raised by this motion, has already been considered.

Our contention in reference to the various efforts that were made by the counsel for the plaintiff in error to raise a Federal question is that such a question is not raised by a mere claim that a certain adverse ruling or decision of the court is in violation of a provision of the Federal Constitution. There must be "some color of right" which is invoked under the provisions of the Federal Constitution before a Federal question can be reasonably said to exist or to have been raised.

New Orleans Waterworks vs. Louisiana, 185 U. S. 336.

Wabash R. R. Co. vs. Flanigan, 192 U. S. 29.

Hughes' Federal Procedure, p. 486.

Allen vs. Georgia, 166 U. S. 140.

Wilson vs. North Carolina, 169 U. S. 586.

Bohanan vs. Nebraska, 125 U. S. 692.

United States vs. McDaniels, 6 Pet. 638.

But even if the record in the case should be thought to show that this Court has jurisdiction, it is manifest that the question on which that jurisdiction depends is

so frivolous as not to need further argument and to justify the conclusion that the writ of error was taken for delay only, and that the judgment of the Supreme Court of Missouri should be affirmed.

IV.

In answer to our contention that this case should be dismissed for the reason that no assignment of errors was returned with the writ of error, as required by section 997, Revised Statutes of the United States, counsel for plaintiff in error contends that under the decisions of this Court in School District of Ackley vs. Hall, 106 U. S. 428, and Gumbel vs. Pitkin, 113 U. S. 546, this Court is not required to dismiss a writ of error for a failure to comply with the provisions of section 997, Revised Statutes. As stated in our original brief, under Rule 21, paragraph 4, it is provided that this Court may, at its option, "notice a plain error not assigned or specified, even where no assignment of errors, as required by section 997, Revised Statutes, has been filed." We contend, however, that no "plain error" appears in the record in this case. Manifestly, if the Court would dismiss a case in which there was no assignment of errors after briefs on the merits had been filed, both for the plaintiff in error and the defendant in error, without a motion to dismiss, the writ of error should be dismissed upon motion for failure to comply with section 997. Clearly it would be imposing no unfair burden upon the plaintiff in error when a motion to dismiss for failure to comply with section 997 is filed to require that he should point out to the Court some "plain error." And failing to do so, he ought not to be heard to contend that the writ of error should not be dismissed.

In the following cases this subject has been considered and the doctrine herein contended for approved.

O'Neill vs. Vermont, 144 U. S. 323.
Rowe vs. Phelps, 152 U. S. 87.
United States vs. Pennsylvania, 170 U. S. 550.

V.

Due notice was served upon the counsel for the plaintiff in error who had appeared for him in the Supreme Court of Missouri, and who had secured the writ of error from that court to the Supreme Court of the United States, that a motion to dismiss or affirm would be submitted to this court on the 25h day of March, 1907. This notice was returned by counsel with the information that he was not an attorney of record in this court and, consequently, was not authorized to accept service of the motion to dismiss. As the time was not sufficient to serve notice upon the counsel for the plaintiff in error in this court for the 25th of March, said notice was served that the motion to dismiss or affirm would be submitted upon April 1, 1907. By reason of the recess taken by the court, this motion was not presented until April 8th. When the first notice was served that the motion to dismiss or affirm would be submitted upon March 25th, a notice was also served that upon that day there would also be submitted a motion to advance this cause for hearing, in case the motion to dismiss or affirm should not be sustained, so that in case the Court desired further argument on the motion to dismiss or affirm, the same could be had in connection with the hearing on the merits.

In answer to this motion to advance, which we intended to submit in case the motion to dismiss or affirm should not be granted, counsel for plaintiff in error con-

tend that the case should not be advanced for the reason that the time would be insufficient for a proper preparation for argument.

As the homicide upon which the case against plaintiff in error is based occurred nearly four years ago, counsel for defendant in error are desirous of as speedy a determination of this writ of error as the convenience of the court will permit. We, however, submit this feature of the case without further suggestion or comment.

Respectfully submitted.

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For Defendant in Error.